

82-2021

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ALEXANDER L. STEVAS.

CLERK

No.

SUPREME COURT OF THE UNITED STATES

October Term, 1982

BENEDICK A. MARSH,

Petitioner,

vs.

CITY OF OAKLAND, a  
Municipal corporation,

Respondent.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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Counsel for Petitioner

## QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit commit prejudicial error in affirming the judgment of the District Court for the Northern District of California which held that California Code of Civil Procedure Sec. 338(1), a three year statute of limitations was applicable to determine if Petitioner's cause of action under Title 42 U.S.C. Sec. 1983 was barred rather than the five year statute set forth in California Code of Civil Procedure Secs. 318 and 336?

2. Did the United States Court of Appeals for the Ninth Circuit commit prejudicial error in affirming the District Court's denial of Plaintiff/Petitioner's request for leave to amend his complaint before Defendant/Respondent had filed its answer in response thereto?

PARTIES

The parties to the proceedings below were Petitioner, BENEDICK A. MARSH, Plaintiff, and Defendant CITY OF OAKLAND, a municipal corporation, Respondent herein.

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No.

SUPREME COURT OF THE UNITED STATES

October Term, 1982

BENEDICK A. MARSH,

Petitioner,

vs.

CITY OF OAKLAND, a  
Municipal corporation,

Respondent.

ON A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Petitioner, BENEDICK A. MARSH, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered March 31, 1983, in favor of Respondent and against Petitioner.

OPINIONS BELOW

Neither the opinion of the United States Court of Appeals nor that of the District Court is officially reported.

A copy of the opinion of the District Court is included herein as Appendix "A".

A copy of the opinion of the United States Court of Appeals is included herein as Appendix "B".

JURISDICTION

The jurisdiction of the District Court originally was invoked pursuant to U.S. Code Title 42, Section 1983 entitled Civil Action for Deprivation of Rights.

The judgment of the Court of Appeals was entered on March 31, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

U.S. Code Title 42, Section 1983  
states as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." (Appendix "C")

In view of the fact that Title 42 U.S.C. Section 1983 does not set forth a statute of limitations, we must determine the same from California Code of Civil Procedure Sec. 338(1) attached hereto as Appendix "E", California Code of Civil Procedure Sec. 318, attached hereto as Appendix "F" and California Code of Civil Procedure Sec. 336, attached hereto as Appendix "G".

Jurisdiction herein is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

On March 20, 1982, Petitioner filed Action No. DC-83-1248 EFL in the United States District Court for the Northern District of California, against Respondent claiming damages for the wrongful condemnation of real property owned by Petitioner and his wife, GERALDINE MARSH, in violation of his civil rights by virtue of Title 42 U.S.C. Section 1983. A copy of said statute is attached hereto as Appendix "C".

In October, 1976, Petitioner MARSH and his said wife, were the owners in joint tenancy of that certain improved real property commonly known and designated as 4163-35th Avenue, Oakland, California. On October 26, 1976. Respondent, CITY OF OAKLAND, through its City Council, adopted a resolution to condemn the said real property of Petitioner and his wife, together with other real properties, located on said 35th Avenue in fee simple absolute for "public streets and

highway purposes".

In response to said resolution, Petitioner directed a letter to the Mayor and City Council of Respondent calling attention to the fact the under the applicable state law, an Environmental Impact Report must be filed with the proper state authority before such action should be undertaken (California Public Resources Code Section 21151. See Appendix D). Appellant is informed and believes that no such report was ever obtained.

Respondent, on December 27, 1976, filed Action No. 471106-7 in the Superior Court of the State of California, in and for the County of Alameda, against Petitioner and his wife for the condemnation of their said property. The Declaration of Service on file in said action states that GERALDINE MARSH was served on January 7, 1977 and Respondent, by substituted service, on January 26, 1977. Petitioner had no knowledge of said action as he had pre-

viously gone to Arizona and then Kentucky for reasons of health. Petitioner believes that his said wife was incompetent at the time of said service and incapable of understanding the significance of the legal documents which were served upon her. Petitioner had no knowledge of the action until long after judgment had been entered.

Defaults were entered against Petitioner and his said wife on September 29, 1977. On November 28, 1977, judgment was granted to Respondent ordering payment of \$48,000.00 to Petitioner and his said wife. The final order of condemnation was filed February 14, 1978 vesting fee simple title in Respondent.

Petitioner MARSH returned in the summer of 1978 and found that Respondent had removed his said wife from the said premises, had demolished the house situated thereon. Also, all of the furniture, furnishings and effects were missing. No ac-

counting of the disposition of said personal property was ever given Petitioner by Respondent herein.

Petitioner filed his action in said District Court under Title 42 U.S.C. Section 1983 for violation of his civil rights by reason of the wrongful taking of his property contrary to the "Due Process" clause of the XIV Amendment of the U.S. Constitution.

The District Court granted judgment of dismissal of Petitioner's cause of action and refused leave to amend on the following grounds even though Respondent had not as yet filed a responsive pleading.

1. The California Statute of Limitations of three years (California Code of Civil Procedure Sec. 338(1)) had run.

2. Petitioner could not cure the defect by amendment.

On appeal, the Ninth Circuit affirmed the judgment of the District Court on March 31, 1983. (No. 82-4352)



## REASONS FOR GRANTING THE WRIT

U.S. Code Title 42 Section 1983 does not set forth a specific statute of limitations in respect to actions brought under said statute.

In Roseman v. Hassler, D.C. PA 1974, 382 F. Supp. 1328, affirmed 520 F<sub>2</sub> 1364, certiorari denied 96 S.Ct. 1128, 424 U.S. 921, the court held that the defense of the statute of limitations applies to actions for civil rights.

### I. Application of Improper Statute of Limitations.

The problem created from the foregoing decision is that confusion results from the application of the state statutes. Many states have different time limits from othe states for the same cause of action. One state may have different limits for different types of civil rights violations. There is no uniformity in the enforcement of Sec. 1983. A person



may have a cause of action which is not barred in one state but would be if the same had accrued in another.

The Ninth Circuit in its decision affirming the judgment of the District Court, determined that civil rights is a liability created by statute and therefor subject to the California three-year limitation. In Shouse v. Pierce Co., 559 F<sub>2</sub> 1142, the court states as follows on page 1146:

"When we select the state statute from the available candidates we try to choose the statute which applies to those state actions and that are sufficiently generous in the time periods to preserve the remedial spirit of federal civil rights actions."

The Ninth Circuit, in its decision could have been "sufficiently generous" to have applied the five year statutes of California Code of Civil Procedure Sec. 336 which states:

"Within five years:

An action for mesne profits of

real property." (Appendix "F".)  
or California Code of Civil Procedure Sec.  
318 which states:

"No action for the recovery of real property or for the recovery of possession thereof, can be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the property in question, within five years before the commencement of the action." (Appendix "G".)

Actions involving real property (except for injury or simple trespass) as shown by the foregoing statutes have a limitation period of five years.

California Code of Civil Procedure  
Sec. 338(1) provides as follows:

"Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture." (Appendix "E".)

Clearly, if Petitioner had wished to bring an action in the State of California for the reversal of the judgment of condemnation against him and the recovery of his

real property, he would have been allowed five years and not three.

A condemnation proceeding is not a liability created by statute. The power of the king to take property was known to the common law.

California appeal courts have held that the five year limitation statute is used in an inverse condemnation suit. In Garden Water Corporation v. Fambrough, 245 CA<sub>2</sub> 324, the California Court states on page 328:

"Acts constituting inverse condemnation amount to more than those of simple trespass. The former involve the taking or damaging of real property for a public use. When an act of trespass amounts to a taking or damaging for a public use it is more than a mere trespass on an interest in land, but it takes from the owner of the land something necessary and essential to the use and enjoyment of the property and thus results in the taking away of a valuable property right.

In the light of the foregoing persuasive analysis of the distinction between trespass and in-

verse condemnation resulting from the taking of real property, we hold that the trial court here correctly applied the five year statute of limitations to respondent's cross-complaint for damages resulting from inverse condemnation."

In Martin v. Western States Gas and Electric Co. 8 CA<sub>2</sub> 226, an action for the taking of water, the California Court held on page 230, as follows:

"It follows that the defendants; appropriation of the plaintiff's riparian right to water from the American River adjacent to his Riverton property constituted a taking and damaging of the real property contrary to the provisions of Article I, Section 14, of the Constitution of California, and the statutory limitation of time within which the owner thereof may recover damages thereof is not barred in three years, but the right of action for damages, under the circumstances of this case, does not expire short of the five years necessary for the defendants to have acquired title by adverse possession."

See also Podesto v. Linden Irrigation District, 141 CA<sub>2</sub> 35, 51.

The District Court, if it had fol-

lowed the doctrine set forth in Shouse, supra, should have applied the five year statute instead of the three.

II. Petitioner Should Have Been Granted Leave to Amend.

Petitioner filed his complaint in this action on March 30, 1982. A copy of the same, together with a copy of the summons, was thereafter served on Respondent, CITY OF OAKLAND. No amended complaint was ever filed. No responsive pleading was filed by said Respondent, but on or about April 20, 1982, said CITY OF OAKLAND filed a motion to dismiss which was set for hearing on May 21, 1982. At the time of said hearing, counsel for both parties appeared and argued the matter. The Court granted Respondent's motion and stated as shown by Reporter's Transcript on page 7, as follows:

"The Court: I'll grant the motion to dismiss.

Mr. Sea: May I have the opportunity to amend?

The Court: How are you going to

amend when you're beyond the statute? I mean--I mean my natural inclination is to say, fine, I'll let you amend, but how are you going to get within the statute?

Mr. Sea: I would like an opportunity, if I may."

The Court finally stated:

"I'll grant the motion to dismiss. I'll grant it without leave to amend."

Judgment in favor of Respondent was entered on June 7, 1982. Nothing was stated in the judgment as to the grounds for dismissal.

Breier v. Northern California Bowling Proprietors' Association, 316 F<sub>2</sub> 787 (9th Circuit 1963) is a case similar to the one at bar. Appellants filed complaints charging anti trust violations by appellees to fix prices. No answers were filed by appellees who did file a motion to dismiss for failure to state a claim. The court granted appellee's motion and denied leave to amend. The Circuit Court held on page 789, as follows:

"We think appellants were entitled to file amended complaints as a matter of right. 'A party may amend his pleading once as a matter of course at any time before a responsive pleading is served \* \* \*' Rule 15(a) Fed. R. Civ. P. A motion to dismiss is not a 'responsive pleading' within the meaning of the Rule. Neither the filing nor the granting of such a motion before answer terminates the right to amend; an order of dismissal denying leave to amend at that stage is improper, and a motion for leave to amend (though unnecessary) must be granted if filed (citing cases)".

The Court further states on page 879:

"Even if the question had been addressed to the court's discretion, we think leave to amend should have been granted. The purpose of pleading under the Rules 'is to facilitate a proper decision on the merits' Conley v. Gibson, 335 US 41, 48, 78 S. Ct. 99, 2 L.ED. 2nd 80 (1957). To this end, Rule 15 was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result".

Breier, supra, also cites Foman v. Davis, 371 U.S. 178, 182, as authority.

In view of the law as set forth in Breier, supra, it would appear that the Court of

Appeals for the Ninth Circuit should have reversed the judgment of the District Court and given Petitioner the opportunity to amend.

CONCLUSION

In order to determine the conflict re-  
the proper application of the various statutes of limitation of the several states in regard to Title 42 U.S.C. Sec 1983, and correct the departure of the Ninth Circuit from the usual course of judicial proceedings in refusing Petitioner leave to amend his complaint, Petitioner prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: May 31, 1983.

Respectfully submitted,

*Donald M. Sea*

DONALD M. SEA  
Attorney for Petitioner

(Appendices follow)



C O P Y

APPENDIX A

ENTERED IN CIVIL DOCKET 6-7-1982

FILED  
Jun 4 4 23 PM 82  
William L. Whittaker  
Clerk  
U.S. DISTRICT COURT  
NO DIST OF CA

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BENEDICK A. MARSH,	)	
	)	
Plaintiff,	)	No. C 82-1248 EFL
	)	
vs.	)	<u>JUDGMENT</u>
	)	
CITY OF OAKLAND, a	)	
municipal corporation,	)	
	)	
Defendant.	)	
	)	

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The Court having granted defendant's,  
City of Oakland, motion to dismiss,

IT IS HEREBY ORDERED AND ADJUDGED that  
judgment be entered for defendant.

Dated: <sup>June 1,</sup> ~~May 21,~~ 1982.

/S/ E. Lynch  
\_\_\_\_\_  
EUGENE F. LYNCH  
United States District Judge

C O P Y

A-2  
APPENDEX B

F I L E D  
MAR 31 1983  
PHILLIP B. WINBERRY  
Clerk, U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BENEDICK A. MARSH,	)	
	)	No. 82-4352
Plaintiff-Appellant,	)	
	)	DC #CV-82-1248-EFL
v.	)	
	)	MEMORANDUM
CITY OF OAKLAND,	)	
a municipal corporation,	)	
	)	
Defendant-Appellee.	)	
	)	

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Appeal from the United States District Court  
for the Northern District of California  
Eugene F. Lynch, District Judge, Presiding  
Submitted March 9, 1983\*

Before: SNEED, SCHROEDER, and FARRIS, Circuit  
Judges.

Marsh appeals the district court's dismissal of his civil rights complaint.

The district court's judgment must be affirmed.

The three-year statute of limitations had run. Briley v. California, 564, F.2d 849,

854, (9th Cir. 1977), and the district court properly denied Marsh's request for leave to amend his complaint because Marsh could not cure the defect. Breier v. Northern California Bowling Proprietors' Ass'n, 316 F.2d 787, 789-90 (9th Cir. 1963).

Affirmed.

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\*The panel finds this case appropriate for submission without argument pursuant to 28 U.S.C.A. 9th Cir. R. 3(a) and Fed. R. App. P. 34(a).

APPENDIX C

TITLE 42, U.S.C., Section 1983.

Civil Action For Deprivation of Rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

APPENDIX D

CALIFORNIA PUBLIC RESOURCES CODE, Section

21151. Findings by Legislative Bodies  
of Cities and Counties Having  
General Plans: Reports by  
Other Local Agencies.

"All local agencies shall prepare, or  
cause to be prepared by contract, and cer-  
tify the completion of an environmental im-  
pact report on any project they intend to  
carry out or approve which may have a sig-  
nificant effect on the environment. . . ."

APPENDIX E

CALIFORNIA CODE OF CIVIL PROCEDURE, Section

338. Three Years - Statutory Suit,  
Trespass, Trover, Fraud and Mis-  
take, Official Bonds, Slander of  
Title.

"Within three years:

1. An action upon a liability cre-  
ated by statute, other than a penalty or  
forfeiture."

APPENDIX F

CALIFORNIA CODE OF CIVIL PROCEDURE, Section  
336. Five Years - Mesne Profits.

"Within five years:

An action for mesne profits of real  
property."

APPENDIX G

CALIFORNIA CODE OF CIVIL PROCEDURE, Section

318. Five Years - Possessory Action.

"No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action."



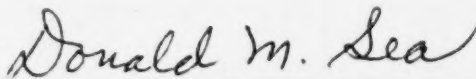
CERTIFICATE OF SERVICE

I certify that I am the counsel for Petitioner in the above-entitled matter and that I served three (3) copies of the foregoing petition upon counsel for Respondent by mailing the same to them by first class mail, postage prepaid this 9th day of June, 1983, as follows:

For CITY OF OAKLAND

RICHARD E. WINNIE, City Attorney

PETER K. FINCK, Deputy City Attorney  
503 City Hall, 1421 Washington St.  
Oakland, California 94612



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DONALD M. SEA

No. 82-2021

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IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1982

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Petitioner,

v.

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Respondent.

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

Brief in Opposition to Petition  
for Certiorari

---

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Telephone: 415/273-3601

Counsel of Record for Respondent,  
CITY OF OAKLAND

PETER K. FINCK, Deputy City Attorney  
Attorney for Respondent

### QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit properly affirm the district court's judgment that, as to the instant case, the applicable statute of limitations for actions brought pursuant to 42 U.S.C.A. § 1983 (1981) was that provided by California Code of Civil Procedure Section 338(1) (Deering's Supp. 1983)?

2. Inasmuch as Petitioner could not possibly have amended his complaint to bring his claim within the three year limit, did the district court properly deny Petitioner's request for leave to amend, and in this regard, did the court of appeals correctly affirm the district court's judgment?

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II. The district court, finding that Petitioner could not possibly bring his complaint within the applicable statute of limitations, properly denied him leave to amend his complaint; and given the absence of clear error, the court of appeals correctly affirmed the lower court's judgment.	11
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No. 82-2021

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

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BENEDICK A. MARSH,

Petitioner,

v.

CITY OF OAKLAND,  
a Municipal Corporation,

Respondent.

---

Brief in Opposition to Petition  
for Certiorari

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STATEMENT OF THE CASE

This case originated in the United States District Court for the Northern District of California as Action No. C 82-1248 EFL when Petitioner there filed his complaint for damages for wrongful

taking of real property on March 30, 1982. That action was brought pursuant to 42 U.S.C. § 1983.

Respondent CITY OF OAKLAND moved the court, pursuant to Federal Rule of Civil Procedure 12(b)(6) to order the complaint dismissed for failure to state a claim upon which relief can be granted. The district court on May 21, 1982, granted Respondent's motion and dismissed the action. On June 1, 1982, judgment was ordered to be entered for Respondent, and judgment was duly entered on June 7, 1982.

Petitioner on June 18, 1982 filed his notice of appeal to the United States Court of Appeals for the Ninth Circuit. That court affirmed the district court's judgment in a memorandum filed on March 31, 1983.

The property which gave rise to Petitioner's claim was considered in



Oakland City Council Resolution No. 55948, duly approved by the Council on October 26, 1976. That resolution empowered Respondent to acquire Petitioner's property by eminent domain. Respondent filed its complaint in condemnation on December 27, 1976. Default judgment in condemnation was ordered in the Superior Court of the State of California and duly entered on November 28, 1977. The superior court found that Petitioner had been served with process, and set the fair market value of Petitioner's property at \$48,000. Final order of condemnation was ordered in that court on February 14, 1978, at which time Respondent had deposited \$48,000 with the court.

Petitioner admits the above sequence of events concerning the disposition of his property, but denies receiving notice of the action until "the summer of 1978".

Petitioner's Brief at 6. It is undisputed that Petitioner had direct knowledge of Respondent's condemnation proceedings at that time.

SUMMARY OF ARGUMENT

The court of appeals rested its decision upon a firm body of case law which had determined that California Code of Civil Procedure Section 338(1) was properly applied to claims arising under 42 U.S.C. § 1983. Additionally, that court decided that Petitioner's request for leave to amend his complaint was properly denied, since the district court found that Petitioner was unable to cure the defective complaint.

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ARGUMENT

I

ABUNDANT PRECEDENT, AS WELL AS SOUND REASONING DICTATE THAT THE THREE YEAR LIMITATION OF ACTIONS PROVIDED BY CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 338(1) WAS CORRECTLY APPLIED TO PETITIONER'S CLAIM, BROUGHT PURSUANT TO 42 U.S.C. § 1983.

42 U.S.C. § 1983 does not contain a limitation of actions provision. In determining the timeliness of claims under the Civil Rights Act, then, federal courts look to appropriate state statutes of limitation. Moore v. Tangipahoa Parish School Board, 594 F.2d 489, 495 (5th Cir. 1979). Specifically on point with the instant case regarding the correct California statute of limitations to be applied in actions brought pursuant to 42 U.S.C. § 1983 is Briley v. State of California, 564 F.2d 849 (9th Cir. 1977). In that case the Ninth Circuit unequivocally stated, "This court has held that

the applicable statute of limitations for actions brought in California under the Civil Rights Act is California Code of Civil Procedure Section 338(1), providing a three-year limitation period 'upon a liability created by statute'." Id. at 854 (citing Ney v. State of California, 439 F.2d 1285, 1287 (9th Cir. 1970)).

California Code of Civil Procedure Section 338(1) (Deering's Supp. 1983) is set forth below:

§ 338. [Statutory liability; Injury to property; Fraud or mistake; Bonds of public officials and notaries; Slander of title; False advertising; Pollution violations; Three years]

Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture.

It is well established that "the federal courts look to the state statute of limitations applicable to the most similar state cause of action." Briley

v. State of California, 564 F.2d 849, 854 (9th Cir. 1977). The only federally cognizable liability which could conceivably attach to Respondent for alleged wrongs concerning the disposition of Petitioner's property is that created by the federal statute, 42 U.S.C. § 1983. Sound reasoning and abundant precedent dictate that California Code of Civil Procedure Section 338(1) was properly applied in the instant case.

Even though state law fixes the time limitation for the filing of a claim, federal courts look to federal law for the time of accrual of a claim. "This federal rule establishes as the time of accrual that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action." Bireline v. Seagondollar, 567 F.2d 260, 263 (4th Cir. 1977) (citing Young v. Clinchfield Railroad Company,

288 F.2d 499, 503 (4th Cir. 1961)).

Petitioner certainly had reason to know about Respondent's eminent domain proceedings when service upon him was perfected on January 26, 1977; and there is no doubt that Petitioner actually knew of the City of Oakland's activities in "the summer of 1978". Petitioner's Brief at 6.

Petitioner's claim accrued, then, within the federal definition certainly no later than "the summer of 1978". His complaint was not filed in the district court until March 30, 1982, at which time the appropriate statutory period for bringing actions had run. A complaint which shows on its face that a claim was not filed within the statutory limit is properly subject to a motion to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)6; Rauch v. Day and Night Manufacturing Corporation, 576 F.2d 697, 702

(6th Cir. 1978). The district court below, therefore, was clearly within proper bounds in granting Respondent's motion to dismiss and in dismissing Petitioner's action on May 21, 1982. The court of appeals correctly affirmed the judgment of the lower court on March 31, 1983.

Petitioner suggests that the three year limitations period prescribed by California Code of Civil Procedure Section 338(1) is inadequate to protect his rights. He cites as support for this proposition Shouse v. Pierce County, 559 F.2d 1142, 1146 (9th Cir. 1977).

When we select the state statute from the available candidates, we try to choose that statute which applies to those state actions that resemble our Section 1983 action and that are sufficiently generous in the time periods to preserve the remedial spirit of federal civil rights actions.

Petitioner's Brief at 9.

It need only be noted that the state statute of limitations under attack in Shouse was a thirty day limitation, in contrast to the more generous three year limitation at issue in the instant case.

Petitioner intimates that the five year limitation provided by California Code of Civil Procedure Sections 336 (action for mesne profits of real property), and 318 (adverse possession) might be applicable to his case. In support of his argument that one of the above-referenced sections applies to the case at bar he cites Garden Water Corporation v. Fambrough, 245 Cal. App. 2d 324, 53 Cal. Rptr. 862 (1966), an inverse condemnation suit; Martin v. Western States Gas and Electric Co., 8 Cal. App. 2d 226, 47 P.2d 522 (1935), an action involving the taking of riparian rights; and Podesta v. Linden Irrigation District, 141 Cal. App. 2d 38, 296 P.2d 401 (1956), an action



concerning the taking of property. It must not be forgotten that Petitioner's present claim is recognized in federal courts solely through the reach of 42 U.S.C. § 1983. The state property suits which he cites and the state statutes of limitations relating to property upon which he so heavily relies are totally inapplicable to questions regarding the correct statute of limitations to apply in a civil rights action.

## II

THE DISTRICT COURT, FINDING THAT PETITIONER COULD NOT POSSIBLY BRING HIS COMPLAINT WITHIN THE APPLICABLE STATUTE OF LIMITATIONS, PROPERLY DENIED HIM LEAVE TO AMEND HIS COMPLAINT; AND, GIVEN THE ABSENCE OF CLEAR ERROR, THE COURT OF APPEALS CORRECTLY AFFIRMED THE LOWER COURT'S JUDGMENT.

In the hearing on Respondent's motion to dismiss for failure to state a claim upon which relief can be granted, the district court below on May 21, 1982

denied Petitioner's request for leave to amend his complaint. Appendix at A-9. Since Petitioner was unable to meet the court's invitation to offer explanation of how he might circumvent the three year statutory limitation, Appendix at A-8-9, the court properly denied Petitioner's request. Appendix at A-9. Petitioner's Brief at 13-14. Although Petitioner in his Brief at 15 relies upon Breier v. Northern California Bowling Proprietor's Association, 316 F.2d 787, 789 (9th Cir. 1963) as support for the maxim that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served...", he fails to mention that Breier went on to hold that "leave to amend should be allowed unless the complaint 'cannot under any conceivable state of facts be amended to state a claim'." Id. at 790 (citing Alexander v. Pacific Maritime

Association, 314 F.2d 690 (9th Cir. 1963)).

The district court upon direct inquiry of Petitioner determined that there existed no state of facts by which Petitioner could state a valid claim. Unless that finding of the trial court is clearly erroneous, Federal Rule of Civil Procedure 52(a) dictates that it shall not be set aside. The Supreme Court of the United States has held in Guzman v. Pichirilo, 369 U.S. 698, 702 (1962), that under the clearly erroneous rule "an appellate court cannot upset a trial court's factual findings unless it 'is left with the definite and firm conviction that a mistake has been committed'" (citing United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

Respondent respectfully asserts that there is no perspective through which one can view the district court's action in

denying Petitioner's request for leave to amend which would lead one to the "definite and firm conviction" that the lower court was mistaken.

CONCLUSION


Respondent respectfully submits that the court of appeals and district court below, having based their judgments upon sound precedent which Petitioner has proved unable to undermine, correctly decided the case at bar. Respondent requests, therefore, that Petitioner's petition to this Court for Writ of Certiorari be denied.

DATED: July 7, 1983

Respectfully submitted,

RICHARD E. WINNIE, City Attorney  
YVONNE GARCIA, Asst. City Attorney  
PETER K. FINCK, Deputy City Attorney

By:

  
Attorneys for Defendant/Respondent  
CITY OF OAKLAND

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE: THE HONORABLE EUGENE LYNCH, JUDGE

BENEDICK A. MARSH,	)	
	)	
Plaintiff,	)	C-82-1248 EFL
	)	
v.	)	
	)	
CITY OF OAKLAND,	)	
a Municipal Corporation,	)	
	)	
Defendant.	)	
	)	

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

May 21, 1982

Reported by:

Raymond Linkerman

APPEARANCES

FOR THE PLAINTIFF:

DONALD M. SEA, Esquire  
Attorney at Law  
Financial Center Building  
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Oakland, CA 94612

FOR THE DEFENDANT:

PETER K. FINCK, Esquire  
Deputy City Attorney  
503 City Hall  
1421 Washington Street  
Oakland, CA 94612

May 21, 1982

THE COURT: MARSH VERSUS CITY OF OAKLAND.

THE CLERK: CIVIL CASE 82-1248.  
Counsel state your appearances, please.

MR. FINCK: Peter Finck appearing on behalf of defendant CITY OF OAKLAND, and moving party.

MR. SEA: Donald Sea appearing for plaintiff BENEDICK MARSH.

THE COURT: Yes. Okay. Well, it's a question over which statute of limitations applies, whether it's a three year or five, and if it's three years, the motion for summary judgment will be granted; is that correct?

MR. FINCK: That's correct, your honor.

MR. SEA: Although if it's granted, your honor, I would like an opportunity to amend, because I think I can get some additional facts that will fit into the

situation, but --

THE COURT: You have the plaintiff?

MR. SEA: Pardon me?

THE COURT: You have the plaintiff?

MR. SEA: Yes, your honor.

THE COURT: Well, how do you --

MR. SEA: However, I'm urging that it's a five-year statute.

THE COURT: Seems to me it should be a three-year one. You're bringing it in federal court, under the federal statute, right? Otherwise you should be in state court. I mean your basis for being here is pursuant to a statute, and the statute -- statute of limitations in California is three years.

MR. SEA: But is this here by reason of a statute?

THE COURT: Well, clearly --

MR. SEA: I mean it's an inverse condemnation --

THE COURT: Well, if it's an inverse



condemnation, it should be over in the state court. You're here in the federal court on the basis that there's a -- under the federal statute, right? I mean if it's just a straight inverse condemnation, what's it doing in the federal court?

MR. SEA: Well, I mean the violation of the civil rights was based on an inverse condemnation.

THE COURT: I understand, but, nevertheless, you're contending that it's a violation of civil rights.

MR. SEA: Right.

THE COURT: But -- so that's a three-year statute in California. If it's just a straight inverse condemnation, why don't you go to the state court?

MR. SEA: Well, that's possible, but I --

THE COURT: I mean if I determine that it's a three-year statute, which I'm

inclined to do, how are you going to amend it to --

MR. SEA: Well, in the first place, the wife could be brought in because she's an incompetent.

THE COURT: I understand that, but what I'm saying is --

MR. SEA: That would --

THE COURT: -- on the face of it, the statute has tolled. Three-year statute has tolled, right?

MR. SEA: Also, the City did not take all of the land, in effect. I mean, there's still part of the land that's there.

THE COURT: But that's a suit you could bring in the state court. Still within the five-year statute.

MR. SEA: Yes, it would be.

MR. FINCK: Your honor, it's -- I can't really add much more. He did bring it under 42 U.S.C. Section 1983, and

that's clearly a -- a three-year statute of limitations.

As far as inverse condemnation, the whole thing started from a very formal procedurally correct eminent domain suit, and we have a -- a judgment signed by a judge --

THE COURT: That's not the point. The point is that it's a three-year or five-year statute, right?

MR. FINCK: Your honor, as far as I can tell by research under federal statute it's a three-year. I mean I just had a decision in the Ninth Circuit on the same type of case, where it's just three years.

MR. SEA: Of course, in that case -- I think you're either referring to the May case, was it?

MR. FINCK: The Briley and the Smith case.

MR. SEA: One of them was a prisoner

suing a chief of police for furnishing of fraudulent transcript.

THE COURT: The basis of the suit is the violation of civil rights?

Submitted?

MR. SEA: Submitted.

MR. FINCK: Yes, your honor.

THE COURT: I'll grant the motion to dismiss.

MR. SEA: May I have an opportunity to amend?

THE COURT: How are you going to amend when you're beyond the statute? I mean -- I mean my natural inclination is to say, fine, I'll let you amend, but how are you going to get it within the statute?

MR. SEA: I would like an opportunity, if I may.

THE COURT: I don't know how you'd do it. What do you have in mind?

MR. SEA: Well, first place, there's

an incompetency here that's involved. Here the service of process was on an incompetent person, and that also constituted service on the plaintiff in this action, because he was absent from the state.

THE COURT: All right. But then they properly served him by publication, right?

MR. SEA: I don't think so.

THE COURT: But, nevertheless, the three-year statute has run for you to be here in the federal court. So I don't see how you're going to be able to amend your complaint to -- to say anything different.

I'll grant the motion to dismiss. I'll grant it without leave to amend. I really think you belong in the state court, frankly. Okay.

MR. SEA: Thank you.

THE COURT: All right.

(PROCEEDINGS ADJOURNED.)

STATEMENT OF RICHARD E. WINNIE  
REGARDING THE FILING OF RESPON-  
DENT'S BRIEF IN OPPOSITION TO  
PETITION FOR CERTIORARI

I, RICHARD E. WINNIE, state that  
forty (40) copies of Respondent CITY OF  
OAKLAND'S Brief in Opposition to Peti-  
tion for Certiorari in the above-captioned  
action were on July 8, 1983 deposited  
in the United States Mailbox at 1421  
Washington Street, Oakland, CA 94612,  
with first-class postage prepaid,  
addressed as follows:

ALEXANDER L. STEVAS  
Clerk  
Supreme Court of  
the United States  
Washington, D.C. 20543

Such mailing occurred within thirty (30)  
days of my receipt on June 10, 1983 of  
Petitioner's Petition for Writ of  
Certiorari, and met therefore the time  
limitation for Respondent's response

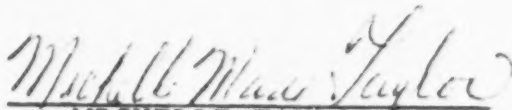
prescribed by United States Supreme Court  
Rule 22.

  
RICHARD E. WINNIE

State of California )  
                                  )  
County of Alameda )     ss.



Subscribed and sworn to before me  
his 7<sup>th</sup> day of July, 1983

  
MICHELLE TAYLOR  
Notary Public

CERTIFICATE OF SERVICE

I, RICHARD E. WINNIE, certify that I am counsel of record in the above-captioned action and that on July 8, 1983, I served on Petitioner three (3) copies of the foregoing Brief in Opposition to Petition for Certiorari by depositing them in the United States Mail at 1421 Washington Street, Oakland, CA 94612, first-class postage prepaid, addressed as follows:

FOR BENEDICK A. MARSH

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Attorney at Law  
405 - 14th Street, Suite 909  
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RICHARD E. WINNIE